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IN THE SUPREME COURT OF THE UNITED STATES

SGT. B. D. SMITH,	:	October Term, 1980
Petitioner	:	
v.	:	No. 80- 329
MILTON McCRAY,	:	
Respondent	:	

RESPONDENT'S MOTION TO FILE A BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI AND TO PROCEED TO THE TERMINATION OF PROCEEDINGS IN FORMA PAUPERIS

Pursuant to 28 U.S.C. §1915 and Rule 46 of this Court, Respondent by his counsel moves this Court for an Order permitting him to file his Brief in Opposition to Petitioner's Petition for Writ of Certiorari and to proceed to the termination of proceedings in forma pauperis, or without the payment of any fees, costs, or security therefor, because as set forth in this Motion and the attached Affidavit:

1. Respondent is indigent and unable to pay any fees, costs, or security to so proceed;

2. In forma pauperis status was sought and granted in the United States District Court for the District of Maryland and on appeal in the United States Court of Appeals for the Fourth Circuit.

RICHARD G. FISHMAN, ESQ.
Keystone Legal Services, Inc.
251 South Pugh Street
State College, PA. 16801
814/238-4958

Attorney for Respondent

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SGT. B. D. SMITH,

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v.

MILTON McCRAY,

Respondent

BRIEF IN OPPOSITION TO A
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RICHARD G. FISHMAN
Keystone Legal Services, Inc.
251 South Pugh Street
State College, Pennsylvania 16801
814/238-4958

Attorney for Respondent

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BRIEF IN OPPOSITION TO A
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STATEMENT OF THE CASE

In McCray's suit against Maryland Penitentiary Officer, Sgt. B. D. Smith, the Respondent sought compensatory and punitive damages for being maliciously placed in an isolated confinement (I.C.) cell without clothes and items of personal hygiene and subject to conditions that allegedly violated the Eighth and Fourteenth Amendments to the United States Constitution.

The Fourth Circuit in McCray v. Burrell I, 516 F.2d 357, 368 (4th Cir. 1975), recognized in the case against Smith that:

> [A] prisoner evidencing mental derangement in a form suggestive of self-harm or harm to others may and should be removed from the general prison population until his true condition can be assayed by those competent to evaluate him; and, until his examination and the formulation of expert opinion, he may be subjected to protective measures.

1/ 31a-32a. However, it held that the conditions of confinement for McCray in the I.C. cell could be justified constitutionally only if the administrative directive requiring the summoning of expert medical attention in the situation was followed. Id. In McCray v. Burrell II, 622 F.2d 705, (4th Cir. 1980), compliance with the administrative directive 12-70 was found not to be forthcoming by Smith. 5a.

McCray spent almost two days in the I.C. cell nude and without any items of personal hygiene and initially was placed in there without a mattress. 25a-27a. No psychiatrist or psychologist ever examined McCray while in I.C. contrary to Petitioner's assertion at page 6 of his Petition for a Writ of Certiorari (Petition). 27a. By Petitioner's own admission he did not notify the psychologist pursuant to the administrative directive until almost 24 hours after McCray's placement in I.C. Smith admitted this notification responsibility was his own.

The only non-party witnesses who testified in regard to Sgt. Smith were Deputy Commissioner of Correction Herndon and Major Clingenpeel. Both testified that under the circumstances of McCray's confinement in an I.C. cell without clothes or a mattress that the psychologist had to be contacted and that

1/ "a" indicates what page of the appendix.

contacting that person almost 24 hours later did not comply with the administrative directive. Major Clingenpeel was a penitentiary officer for over 28 years.

Contrary to Petitioner's assertions, Sgt. Smith testified as to the harm he perceived from McCray's behavior, which resulted in his removing McCray's clothes and denying him a mattress. He also stated that if he perceived no harm the inmate got a mattress and coveralls when going into I.C.

Smith testified about the situation in 1973, as follows: "Well, he [McCray] did'nt make any specific harm, but he said he wasn't going to do any time in the South Wing, he would rather die than do time in the South Wing, and so, that was enough for me to see that he might do something to injure himself, that's why I took precautions." Smith also said in 1973, as he did in 1977, "If an inmate is going to do some harm to himself, I remove the mattress. If he's not attempting to do any bodily harm to himself, he gets a mattress when he goes in. Also, a pair of coveralls."

McCray received neither clothes nor a mattess. Thus, Smith thought he was going to harm himself. There is no indication he thought McCray was merely acting out. Furthermore, McCray had already ripped the locker off his cell wall and "[H]e started screaming, you know, real loud, as a matter of fact, I [Smith] never heard a man scream as loud before . . ."

If Sgt. Smith did not think McCray was in such a mental state as to justify contacting a psychologist, there was no basis for his confining him under the conditions of I.C. described herein. In this regard, the Fourth Circuit noted:

> What is clear, however, is that if McCray's mental condition was reasonably believed to be so suspect as to justify the conditions we have described, then it was such as to warrant if not the actual ministrations of professional personnel, an immediate effort to gain him prompt medical evaluation and necessary treatment.

The conclusion that McCray was in such a mental state as to require immediate medical attention is buttressed by the District Court's prior decision when it discussed the directive and said "[A]n inmate may be placed in an isolation cell for his own safety or that of the inmate population when he displays mentallydisturbed behavior. Such behavior was clearly present in the instant case." McCray v. Burrell, 367 F.Supp, 1191, 1214 (D.Md. 1973), 45a.

Smith, in 1977, shifted his position to attempt to come within the confines of a subjective good-faith defense, by now claiming that he did not think McCray would harm himself. The Fourth Circuit recognized this shift in position. 5a. Again, as in McCray I, the Court proclaimed that if Smith only thought McCray was "acting out" or emotionally disruptive, then the conditions under which he was placed in I.C., without prompt medical attention, could not be justified. Id.

SUMMARY OF ARGUMENT

The Petitioner has failed to substantiate any reason under Rule 17 of this Court to justify its issuance of a Writ of Certiorari. The Petitioner is merely asking for this Court to make a factual determination more to his liking, even though the Court of Appeals followed established law and usual judicial proceedings in reaching its decision.

The Fourth Circuit gave due deference to the findings of the Trial Court but effectively found them clearly erroneous because of their illogic and internal inconsistencies and appropriately applied the tests of good-faith defense as established by the decisions of this Court.

ARGUMENT

A. CONSIDERATIONS UNDER RULE 17 ARE ABSENT IN THIS CASE AND THE WRIT SHOULD BE DENIED

The Petitioner has presented no argument within the meaning of Rule 17 of this Court to justify issuance of the Writ. Petitioner has merely asked this Court to make a subjective analysis of facts for purposes of a good-faith defense surrounding the Respondent's confinment in I.C. by Smith. The Fourth Circuit did not "so far depart[ed] from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision" within the meaning of Rule 17. The Court of Appeals merely reached a result on the subjective prong of a good-faith defense which was contrary to the wishes of Petitioner.

As Petitioner has the burden on a good-faith defense[2/] and since he failed to satisfy the subjective test, there was no necessity for the Fourth Circuit to examine the then existing case law as part of the objective standard of good-faith. Procunier v. Navarette, 434 U.S. 555 (1978); Wood v. Strickland, 420 U.S. 308 (1975). Consequently, Petitioner's argument at page 13 of his Petition that the Fourth Circuit emasculated the objective standard of Wood and Procunier is inapplicable.

B. SUBJECTIVE BAD FAITH WAS PRESENT

As to what constitutes malicious intent for purposes of an

2/ Gomez v. Toledo, ___U.S. _____, 100 S.Ct. 1920 (1980).

analysis of subjective good-faith, this Court has referred to the RESTATEMENT (SECOND) OF TORTS §8A (1965). Procunier v. Navarette, 434 U.S. at 566. Malicious intent under the Restatement includes intentional injury. Id. Yet, this malicious intent also includes reckless conduct of one who does not intend to cause the consequences of his acts, but should realize that there is a strong probability that the harm will occur. Id. at §500; Bogard v. Cook, 586 F.2d 399, 412 (5th Cir. 1978). Comment b to Section 8A in recognizing this identical treatment states, "If the actor knows that the consequences are certain, or substantially certain to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." Furthermore, unlike Procunier, the instant case does not contain only an allegation of negligent conduct on the part of prison officials.

Here, Smith was aware of the probable harm to McCray and since his condition required the contacting of medical help as soon as he was placed in I.C., as testified to by Deputy Commissioner Herndon and Major Clingenpeel, Sgt. Smith must be treated as having intended the consequences of his acts within the meaning of the word malicious. The Opinion in McCray II is not to the contrary.

C. DUE DEFERENCE WAS ACCORDED THE FINDINGS OF THE TRIAL COURT

While Rule 52(a) of the Federal Rules of Civil Procedure requires that findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge the credibility of the witness," this rule was adhered to in the case at bar, under various decisions interpreting the meaning of "clearly erroneous" and "credibility of the witness."

In Jones v. Pitt County Board of Education, 528 F.2d 414, 418 (4th Cir. 1975), the Court held:

> We recognize that we are not bound by the factual determinations of the District Court merely because they are supported by substantial evidence, and that a finding may be rejected as "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. United States v. U. S. Gypsum Company, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

See, e.g., G & R Corp. v. American Security and Trust Company, 523 F.2d 1164, 1171, 1172 (D.C. Cir. 1975); Case v. Morrisette, 475 F.2d 1300, 1307 (D.C. Cir. 1973); Fisher v. United States, 441 F.2d 1288, 1290 (3rd Cir. 1971).

It has been held that even where "substantial evidence" supports the fact-findings, they may be set aside, if the Court "[I]s convinced that the finding does not reflect the truth and right of the case." Bianchini v. Humble Pipeline Co., 480 F.2d 251, 253 (5th Cir. 1973).

As to credibility, it has been stated it "[I]nvolves more than demeanor and comprehends an overall evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL §2585 at 736-737.

Finally, "It is essential, however, that there be a logical and convincing connection between the facts established and the conclusion inferred." United States v. Bycer, 593 F.2d 549, 550 (3d Cir. 1979).

The internal consistency and logical connection of facts with the conclusion drawn did not hold together in this case.

In 1973 Smith asserted his fear of harm to McCray as a justification for initially placing him in I.C. without clothes or a mattress. Four years later he cannot claim that this fear never existed, as an excuse for his failure to promptly summon medical help.

D. PETITIONER FAILED THE OBJECTIVE TEST OF A GOOD-FAITH DEFENSE EVEN IF THE SUBJECTIVE PRONG WAS SATISFIED

Even under an objective analysis of good-faith, Sgt. Smith in 1971 would have been on notice as to the unconstitutionality of his actions. The District Court either ignored then existing case law or read the issue too narrowly in stating it could find no decisions giving Respondent an unquestioned right to have a psychologist immediately notified. 16a; Petition at 11-12.

In the cases cited by the District Court in its Opinion as not putting Sgt. Smith and Captain Burrell in the companion case on notice as to the unconstitutionality of their actions,[3/] medical care or its availability was either an essential issue in evaluating the conditions of confinement or prison regulations were discussed or cited which required the permission of a medical person or psychiatrist in order to place an inmate in a stripped cell without clothes or sanitary articles.

In Jordan v. Fitzharris, 257 F.Supp. 674 (N.D. Cal. 1966) the Plaintiff brought suit about conditions in solitary confinement strip cells, including a Chinese toilet flushed from the outside, lack of sanitation or sanitary articles in the cells, improper lighting and a lack of cell bedding and furnishings and inadequate medical care. Id. at 676-678.

In finding these conditions unconstitutional, the Court in Jordan commented on a proposed manual of procedures for use of the strip cells and said:

3/ 17a-22a

> [T]he practices set out in the manuals relied upon by defendants would, if adopted and followed, meet the minimum standards required by the Eighth Amendment.

Id. at 683. The manual provided in part:

> The not uncommon practice of confining insane inmates there [in strip cells[is indefensible, all insane inmates should be transferred to a mental hospital or medical psychiatric treatment facility.

Id. Jordan would at a minimum here, command a psychiatric or psychological person to attend to McCray who was confined under similar conditions.

In Wright v. McMann I, 387 F.2d 519 (2d Cir. 1967) conditions involving being placed nude in a barren, dirty cell, in the cold of winter without hygienic materials was held to be a violation of the Eighth Amendment, if proven. Id. at 526. In making its determination the Court specifically referred to regulations of the United States Bureau of Prisons as not permitting the conditions Wright alleged:

> They require that "the quarters used for segregation shall be well ventilated adequately lighted, appropriately heated and maintained in a sanitary condition at all times," an inmate can be deprived of clothing only when prescribed by the Chief Medical Officer for medical or psychiatric reasons; and toilet tissue, tooth brush, comb, etc. are not to be denied a segregation inmate.

Id. This case was then remanded to the District Court which found Wright's nude confinement in a strip cell cruel and unusual punishment. Wright v. McMann, 321 F.Supp. 127, 128 (N.D.N.Y. 1970). The Dis trict Court in Wright also required appropriate regulations be issued prior to the cells being used. On appeal, the Second Circuit reversed that part of the lower Court Order requiring new regulations because in its Opinion, rules already

existed to cover the situation. Wright v. McMann II, 460 F.2d 126, 131 (2d Cir. 1972).

The regulations in Wright provided for various furnishings and health and sanitation conditions for one confined in punitive segregation. Id. 7 N.Y.C.R.R. §§300.1-301.9. The District Court here states in this regard "the court [in Wright] tacitly approved regulations permitting the removal of lights, toilets, beds, washstands and mattress from psychiatric observation cells if there was imminent danger that the inmate would destroy them or use them to harm themselves". 22a. / However, the District Court in the case at bar ignores the following part of these same regulations, also cited in Wright:

> "(d) In cases where the inmate is deprived of clothing, and is without some sufficient means of covering his body, or where the inmate is kept in a cell without mattress and blankets at a time when inmates in the general population are in bed, the report shall be delivered to whoever is in charge of the facility at the time and it shall be the duty of that person to make every effort to have a physician visit the inmate immediately. If a physician cannot visit the inmate within two hours of the time the inmate is deprived of the item, it shall be the duty of the person in charge of the facility at the time to personally visit the inmate and determine the necessity for deprivation of the item and, where such deprivation is continued, to arrange for a physician to visit the inmate as soon as possible."

7. N.Y.C.R. §301.7(d).

These New York correction regulations as set forth in the second Wright v. McMann case would certainly indicate a duty to get medical help for McCray.

Landman v. Royster, 333 F.Supp. 621 (E.D.Va. 1971), involved a suit brought over solitary confinement conditions including denuding of an inmate and removal of a mattress, among

other deprivations. Id. at 627. As to denuding it was said: "The Court will permit an inmate to be kept nude in his cell only when a doctor states in writing that the inmate's health will not thereby be affected and that the inmate presents a substantial risk of injuring himself if given garments." Id. at 648. The Landman Court went on to say "If the cell is otherwise clean, and well heated, and the prisoner keeps his clothing, it should not be detrimental." Id. at 649.

In Hancock v. Avery, 301 F.Supp. 786 (M.D.Tenn. 1969), a prisoner was placed for non-punitive reasons in solitary confinement. The cell conditions included a chinese toilet (flushing controlled by an outside officer), no lighting, no hygienic or sanitary facilities and plaintiff's nude placement on a concrete floor for purposes of sleeping. Id. at 791-792.

Interestingly, the defendants in Hancock argued that the conditions were constitutional because plaintiff had a daily opportunity to make complaints to medical personnel. Id. at 789. Despite this argument the Court went on to say that "confinement under the conditions of harshness and cruelty reflected by the present record should not be tolerated for any length of time, however brief." Id. at 792.

In Jones v. Wittenberg, 323 F.Supp. 93, 99 (N.D.Ohio 1971) the Court found conditions similar to those in the instant case as cruel and unusual punishment. The same Court later spoke more directly to the issue, and proclaimed standards in Jones v. Wittenberg, 330 F.Supp. 707, 720 (N.D.Ohio 1971). The Court in Jones v. Wittenberg stated that isolation must have proper heat, light, ventilation and sanitation and that prisoners not be deprived of clothing. Id. Its conditions were to mirror those

in the normal institutional population except for freedoms and privileges. Id. Furthermore, "Prisoners who appear dangerously violent or suicidal must be examined immediately by a physician, and if he deems it advisable, removed to a mental hospital." Id.

In Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966), the Court decried the lack of effective control and supervision on personnel in direct charge of segregation, which ultimately adds punishment to those confined there and raises due process and Eighth Amendment questions. Id. at 139, 141. Such problems are present in the case at bar.

Furthermore, the District Court's distinguishing of isolation cases involving similar conditions on the basis that they involved punitive confinement[4/] only strengthens the plaintiff's case as what may be justifiable in a punitive setting will not necessarily survive in the situation here. McCray v. Burrell, I, 516 F.2d at 367, 29a-30a.

Other Courts deciding cases around the time of the incident here and involving similar conditions have also found them unconstitutional, in violation of Eighth Amendment proscriptions. Anderson v. Nosser, 438 F.2d 183, 193 (5th Cir. 1971); Knuckles v. Prasse, 302 F.Supp. 1036, 1061 (E.D.Pa. 1969); aff'd (per curiam) 435 F.2d 1255 (3d Cir. 1970); Holt v. Sarver, 300 F.Supp. 825, 832-833 (E.D.Ark. 1969).

Thus, the objective test of good faith indicates the state of the law of the time at the incident in question clearly established that McCray could not be confined with a lack of medical attention under the deprivations present. Sgt. Smith should have been on notice of the various decisions discussed herein.

4/ 21a

As Sgt. Smith was under an obligation to follow a directive prescribing immediate medical attention, his position is even more untenable than the situation where medical care is not provided, but no regulation prescribing such exists for guidance.

Thus, under the objective or subjective test there is nothing to indicate the Fourth Circuit substantially departed from the usual course of judicial proceeding in reaching the result involved in this case.

CONCLUSION

WHEREFORE, Respondent prays that the Petition for a Writ of Certiorari be denied.

RICHARD G. FISHMAN, ESQ.
Keystone Legal Services, Inc.
251 South Pugh Street
State College, PA. 16801
814/238-4958

Attorney for Respondent

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CERTIFICATE OF SERVICE

I, RICHARD G. FISHMAN, ESQ., hereby certify, pursuant to Rule 28.3 that I served a true and correct copy of the Brief in Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and Respondent's Motion and Affidavit to Proceed in Forma Pauperis to Donald R. Stutman, Assistant Attorney General, Attorney for Petitioner, One South Calvert Building, Baltimore, Maryland 21202, by first-class mail postage prepaid on this 23rd day of September, 1980. I further certify that all parties required to be served have been served.

Richard G. Fishman

RICHARD G. FISHMAN, ESQ.
Keystone Legal Services, Inc.
251 South Pugh Street
State College, PA. 16801
814/238-4958

Attorney for Respondent